

Briefing on the draft Online Safety Bill

September 2021

Executive summary of the NSPCC response to the Government's draft Online Safety Bill

In the NSPCC's report, Duty to Protect, we set out a series of indicators that determine whether regulation meets our six tests for effective Duty of Care regulation, and whether they go far enough to protect children from avoidable abuse.

We find that the draft Bill either meets these tests in nine of 27 indicators, or we are broadly satisfied with the Government's proposed approach. **However, in ten indicators, these tests remain largely or wholly unmet.** These include concerns around the scope of the proposed safety duties, the effectiveness of the child abuse response (including how the Bill maps on to the dynamics of the child abuse threat), substantive weaknesses in the proposed child safety duty, the strength of the enforcement measures, and a lack of formal user advocacy arrangements for children.

The Government have said that they want the Online Safety Bill to make UK the safest place in the world to be a child online. To achieve this, the Bill must be strengthened further. The legislation must be seen as a crucial part of the child protection landscape for decades to come, and ensure children, families and society no longer have to bear the costs of industry inaction, in the form of the life-changing impacts of child sexual abuse.

During pre-legislative scrutiny, the Government must address these concerns and offer children the strongest possible protections from preventable harms in the final Online Safety Bill.

Background

The NSPCC has been at the forefront of the campaign for online harms legislation that introduces a social media regulator. Last year the NSPCC set out six tests that the Online Safety Bill must meet if it is to effectively tackle online child abuse, which included introducing a Duty of Care on tech companies.

The draft Online Safety Bill is now subject to pre-legislative scrutiny. It has potential to deliver a robust but proportionate systemic approach, that requires platforms to proactively identify and mitigate the potential risks to children. However, we have significant concerns about whether the draft Bill is suitably ambitious to protect children from preventable and avoidable online abuse.

This has never been more important and the figures below highlight how the scale and complexity of online harms continues to increase:

- There was a record-high **70% increase in offences related to Sexual Communication with a Child** recorded between April 2020 and March 2021. Almost half of the offences used **Facebook owned apps**, including Instagram, WhatsApp and Messenger.¹
- The Internet Watch Foundation saw a **77% increase in reports of 'self-generated' child sexual abuse material** in 2020.²
- NSPCC helplines saw a **60% increase in the number of contacts concerning online child sexual abuse**, compared to the period before the pandemic.³
- Private messaging is now a primary vector for online abuse: from March 2019-2020 **one in six children (17%) aged 10 to 15 years had spoken with someone they had never met before** (equivalent to 682,000 children). Where children are contacted by someone they don't know in person, in **74% of instances this takes place through private messaging**.⁴

Areas where the draft Bill must be strengthened

If the Government strengthens the Bill in a number of key areas they will be able to demonstrate legislation that is effective, commensurate to the child abuse threat and that delivers a suitably bold and ambitious approach. Below, we set out the current shortcomings in the draft Bill and how they can each be addressed.

The Duty of Care

Although the draft Online Safety Bill proposes a largely systemic approach, it does not propose an overarching general safety duty. Instead there are three thematic duties of care, with duties applying in relation to **illegal content (Clause 7 and 9)**; if likely to be **accessed by children (Clause 10)**; and if large or high-risk are services likely to be **accessed by adults (Clause 11)**. For each duty, relevant platforms will have to identify risks and take proportionate steps to mitigate them ('safety duties'). Each differential duty is accompanied by underpinning obligations to perform a risk assessment.

The draft Bill should **set out an overarching safety duty that 'sits above' the different safety duties** that are proposed. This overarching safety duty would provide clarity to a structurally complex piece of legislation and keep the resulting range of secondary legislation, codes and guidance focused on its fundamental safety objectives. This would focus companies understanding on the risks to individuals using their services, including those that result from their design and operation, and ensure they put in place appropriate systems to improve safety and monitor their effectiveness.

Tackling the child abuse threat

Cross-platform risks

The draft Bill fails to tackle the way online abuse spreads across platforms through well-established grooming pathways, in which abusers exploit the design features of social networks to make effortless contact with children, before the process of coercion and control over them is migrated to encrypted messaging or live streaming sites.

The Bill needs to **introduce a duty on Ofcom to address cross-platform risks**, and to place a clear requirement on **platforms to co-operate on cross-platform risks** and respond to cross-platform harms when discharging their safety duties. Without an express duty, the overall effectiveness of the legislation will be heavily constrained. Potential interplays with competition law, that otherwise might restrict the parameters of cross-platform co-operation, will not be adequately addressed.

Material that directly facilitates child abuse

The Bill fails to adequately tackle content that directly facilitates child abuse, but does not meet the criminal threshold to be considered child abuse material. This includes the way abusers use online services to organise in plain sight; post 'digital breadcrumbs' that signpost to illegal content; and re-victimise children through the sharing and viewing of carefully edited child abuse sequences. Tackling this is vital to prevent abuse upstream and disrupt it at the earliest opportunity.

The **scope of the safety duty on illegal content should be amended** to treat material that directly facilitates abuse with the same severity as illegal content.

Private messaging

We are pleased to see private messaging included in scope of the draft Bill, and the regulator be given powers to compel companies to use approved technologies to detect child abuse content on their platforms under a **'technology warning notice' (Clause 63)**. However, we are concerned that the **proposals may set the threshold too high for the regulator to use these powers**. Ofcom may find itself in a 'Catch 22' of being unable to use the technology warning notice: it must first demonstrate there is persistent and prevalent abuse, but may find itself unable to do so because of design choices such as end-to-end encryption that significantly erode reporting capability and abuse volumes. Future technological changes, including Twitter's proposals to introduce a decentralised operating standard, also means that technology warning notices may not be future-proof.

It would clearly be beneficial for Ofcom to take **enforcement action at an earlier stage of the regulatory process**, where a platform is unable to demonstrate that a high-risk design feature can adequately meet its safety duties.

Achieving a higher standard of protection for children

Child use test

The draft Bill sets a higher threshold for whether a service is likely to be accessed by a child than the ICO's Children's Code. **Clause 26 requires that a 'significant' number of children use a service** before it is subject to the Bill's child safety duty, and therefore must protect children from age-inappropriate and harmful content. This is likely to mean that harm is displaced, rather than tackled. Highly problematic services including Telegram and Only Fans will be able to legitimately argue that their predominant user base are adults and therefore be excluded from the child safety provisions.

The Government should **amend the scope of legislation** to ensure any service likely to be accessed by a child is covered by regulation.

Definition of harm

The way the draft Bill defines harm runs the risk of **offering lower standards of protection** to children than has been established in the Video Sharing Platforms regulation, which sets out to protect all children under the age of 18 from ‘material that might impair their physical, mental or moral development’. **Clause 45(3)** of the draft Bill defines harmful content as having a ‘significant adverse physical or psychological impact on a child of ordinary sensibilities’, and is unclear if platforms should consider the cumulative impact of content, including material recommended as a result of algorithmic design choices.

The Government should **ensure future legislation does not provide lower levels of protections** for children online than current regulation provides.

Age assurance

The draft Bill’s provisions to protect children from harmful content, including age-inappropriate pornography, or content that glorifies self-harm or suicide, will likely require the adoption of age assurance technologies, which can determine with reasonable certainty whether a user is a child, and needs additional account protections.

The Government must **set out more details on how age assurance will be implemented as part of the Online Safety Bill**, including if and when it will set standards for new technologies. If age assurance cannot be rolled out effectively, including by smaller sites, the Government should set out how it intends to meet its legislative objectives.

Commercial pornography

As it stands, commercial pornography sites that **do not host user-generated content are out of scope of the draft Bill**.

We welcome the Government’s indications that they are open to resolving this issue, which could be done by widening the scope of regulation to bring in all sites that host adult content. Unless the Bill’s scope is widened, it risks offering less protections than either the Digital Economy Act or Ofcom’s Video Sharing Platforms regulation, which requires specific age verification measures but only applies to a small range of UK-based services that host sexually-explicit content.

User advocacy measures

The Online Safety Bill should **introduce a statutory user advocacy body for children, funded by the industry levy**. This is essential to make sure children’s voices and experiences take a central role in the regulator’s decisions, and ensure there is an effective counterbalance to well-resourced industry interventions.

Without formal mechanisms in place, there is no guarantee civil society can continue to support the regulator, nor offer the support, expertise and critical challenge to it to the extent that is required.

User advocacy arrangements are a standard part of other regulated settlements, from postal services to public transport, where the user voice is funded and empowered. But as it stands, **children – the most vulnerable set of internet users, and at heightened risk of sexual abuse – will receive less statutory advocacy protections than customers of a post office or passengers on a bus**.

Ofcom’s regulatory powers and resources

Enforcement powers

We have significant concerns about the Government’s decision not to introduce broad-based senior management liability. There are reserved powers to introduce criminal sanctions against senior managers, but these only apply for limited procedural reasons. There is no direct relationship in the Bill between senior management liability and how and whether a platform discharges its safety duties. As a result, these provisions are poorly targeted towards child safety outcomes.

The **Bill should introduce a Senior Managers Scheme that imposes personal liability on staff** whose actions consistently and significantly put children at risk. This scheme would have the ability to bring proceedings against senior managers that fail to uphold a set of conduct rules. Under the scheme, senior managers could face proportionate sanctions such as fines, disbarment or censure.

The model works effectively in financial services, and is crucial to driving cultural change, and a ‘culture of compliance’.⁵ For the most significant failings that resulted in a significant risk of exposure to illegal harm, criminal sanctions should apply. This would be wholly consistent with existing jurisprudence relating to systemic failures of duties of care.

Information disclosure duties

Effective investigatory and information disclosure powers are crucial to the regulator's success. We are disappointed that the draft **Bill fails to introduce broad but workable information disclosure duties on platforms.**

Building on the lessons of financial services regulation, **large online services should face a proactive duty to disclose to the regulator any information that it could reasonably be expected to be aware,** and to proactively flag any breaches in systems and processes that may expose children to risk of harm.

Building the regulatory regime

This task the draft Bill is asking Ofcom to do is considerable, and it is important they have the resources and expertise to act credibly and effectively. During pre-legislative scrutiny, we encourage members to **closely scrutinise the development of regulatory arrangements.** They should be confident that Ofcom is developing a strong understanding of the online child abuse threat and satisfied that it is demonstrating a clear, effective and consistently child-centred approach to the discharge of its functions, including meeting their statutory obligations to ensure children receive a higher standard of protection than adults.

The regulator's independence must be safeguarded throughout, with extensive Parliamentary scrutiny of its work. We **encourage close scrutiny of the powers of the Secretary of State to issue a statement of strategic priorities (Clause 109) and to amend a Code of Practice to reflect Government policy (Clause 33(1)).**

Notes

- 1 NSPCC (2021) <https://www.nspcc.org.uk/about-us/news-opinion/2021/online-grooming-record-high/>
- 2 IWF (2021) <https://www.iwf.org.uk/news/call-experts-help-tackle-growing-threat-'self-generated'-online-child-sexual-abuse-material>
- 3 NSPCC (2020) The impact of the coronavirus pandemic on child welfare: online abuse London: NSPCC
- 4 ONS (2021) Children's online behaviour in England and Wales: year ending March 2020 London: ONS
- 5 Chiu, I (2016) Regulatory duties for directors in the financial services sector, and directors duties in company law – Bifurcation and Interfaces. Journal of Business Law, 2016.

What can Parliamentarians do to ensure the draft Online Safety Bill will effectively tackle child abuse online?

It is vital that the Government address these substantive concerns in the draft Online Safety Bill during the period of pre-legislative scrutiny.

Your support can ensure child protection is front and centre in legislation and future regulation. You can do this by:

- Putting these concerns to the Minister during DCMS oral questions, in a debate or in a written question
- Asking questions on child protection measures during the Joint Pre-Legislative Scrutiny and Digital, Culture, Media and Sport Committee sessions on the draft Bill
- Become an active supporter of the NSPCC's Wild West Web campaign. Find out more at <https://www.nspcc.org.uk/support-us/campaigns/end-child-abuse-online>

To arrange a meeting and discuss how we can work together to achieve this, please contact alison.trew@nspcc.org.uk